REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 238 OF 2014

SADRUDDIN SHAMSUDEEN NIMJI.....PLAINTIFF

-VERSUS-

GULSHAN SHAMSUDEEN NIMJI.....1ST DEFENDANT

NAZIR JINNAH.....2ND DEFENDANT

LAILA SALEHMOHAMED.....3RD DEFENDANT

RULING

[1] The Notice of Motion that is the subject of this Ruling is the one dated **12 April 2016**. It was filed by the Defendants pursuant to **Order 2 Rule 15(1)(a)** and **(d)** of the **Civil Procedure Rules** for orders that the Plaint filed herein dated **6 June 2014** be struck out and the suit be dismissed; and that the costs of the application and the entire suit be awarded to the Defendants. The Defendants' contention is that the dispute herein is in respect of the management of the company known as **Zaisal Limited** (hereinafter **"the Company")** and therefore is governed by **the Companies Act**. For that reason, the Defendants averred that, since **Section 211** of **the repealed Companies Act was** specific as to the procedure for commencing an action by a shareholder in relation to the ventilation of alleged issues of mismanagement of the suit company, this suit, which was commenced by way of Plaint, is misconceived and is an abuse of the process of the court. It was further contended that the Plaint does not disclose any reasonable cause of action against the Defendants and therefore ought to be struck out with costs.

[2] The Plaintiff filed a Replying Affidavit in response to the application, sworn on **21 June 2016**, in which he averred that he was constrained to file this suit on **6 June 2014** against his mother, (the 1st Defendant) and sister, (the 3rd Defendant) to enforce his entitlement to **80 shares** in the Company, that were transferred to him way back in **1997** by his late father, **Shamsudeen Nimji**. The Plaintiff then provided a chronology of events herein since, and listed the various applications that have been filed by the parties. According to the Plaintiff, it is hypocritical for the Defendants to claim that the suit is defective when they have applied for and obtained orders in the suit which they continue to enjoy to date; which orders were annexed to the Replying Affidavit as **Annexures SSN5(a) and (b)**. He posited that those applications and the suit itself raise weighty triable issues which cannot be wished away through technicalities as is proposed by the Defendants. Thus, the Plaintiff urged the Court to dismiss the application dated **12 April 2016** and proceed to dispose of the pending applications with a view of paving the way for the hearing of the suit for a determination on the merits.

[3] Order 2 Rule 15(1) of the Civil Procedure Rules, under which the application has been brought provides that:

"At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-

> **a. it discloses no reasonable cause of action or defence; or**
>
> **...**
>
> **b. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."**

[4] Needless to say that it is inappropriate to combine an application under **Rule 15(1)(a)** with **(b)** for the reason that, whereas evidence is admissible pursuant to **Rule 15(1)(d)** no evidence is required for purposes of **Rule 15(1)(a) of Order 2, Civil Procedure Rules.** The Court of Appeal, in the case of **Olympic Escort International Co. Ltd & 2 Others vs. Perminder Singh Sandhu & Another [2009] eKLR**, expressed itself thus in this connection:

> "**We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered."**

Be that as it may, it is noteworthy that no affidavit was filed in support of the application.

[5] I have perused the pleadings filed herein along with the written submissions filed by the Defendants as well as the Plaintiff's Replying Affidavit. The Plaintiff's cause of action was that the 2nd Defendant, alleging to be a holder of a proxy and Power of Attorney from the 1st Defendant, purported to give a notice dated **16 May 2014** calling for an Extraordinary General Meeting (EGM) of the Company to be held on **9 June 2014**. It was the Plaintiff's contention that the said notice was given in contravention of **Sections 132** and **136** of the repealed **Companies Act** and the Articles of Association of the Company. The Plaintiff also disputed the proposal to transfer 80 shares to the 3rd Defendant, contending that those same shares had been transferred to him by his late father and founder of the Company. Accordingly, the Plaintiff prayed for judgment against the Defendants jointly and severally for:

> [a] An injunction to restrain the Defendants by themselves, their servants or agents or otherwise howsoever from holding, carrying on or proceeding with the EGM that was scheduled for **9 June 2014** or with any other General Meeting called in breach of the Companies Act and the Articles of Association of Zaisal Limited;
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> [b] A declaration that the 3rd Defendant is not a member **Zaisal Limited;**
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> [c] Alternatively, a declaration that the Eighty (80) shares the 3rd Defendant holds in **Zaisal Limited** are held in trust for the 1st Defendant and the Plaintiff;
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> [d] Rectification of the register of members of **Zaisal Limited** to reflect that the Eighty (80) shares held by the 3rd Defendant belong to the Plaintiff;
>
> [e] Damages.
>
> [f] Costs.

[5] It was in the light of the prayers aforestated that the Defendants contended that the Plaintiff being a shareholder of the Company by voluntary subscription, is bound by the provisions of the Companies Act,

and the terms of the Memorandum and Articles of Association of the Company, and in particular, **Section 211**of the **Repealed Companies Act**, which, in their view, prohibits a shareholder from commencing a suit by way of Plaint to ventilate alleged issues of mismanagement of the Company. That provision reads:

> **"(1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or, in a case falling within subsection (2) of section 170, may make an application to the court by petition for an order under this section;**
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> **(2) If on any such petition the court is of the opinion**
>
> **(a) that the company's affairs are being conducted as aforesaid; and**
>
> **(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the court may, with a view of bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."**

[6] The Plaintiff has opted to approach the Court via a Plaint as opposed to a Petition. His complaint, as has been pointed out herein above is that the 2nd and 3rd Defendants have no right to act on behalf of the Company; and that the notice by the 2nd Defendant calling for an EGM was irregular, unlawful and in breach of the Companies Act. Accordingly, the suit ought to have been brought by the Company itself. This is in accord with the principle laid down in the case of **Foss vs. Harbottle [1843] 67 ER 189,** which principle was restated by **Jenkins LJ** in the case of **Edwards vs. Halliwell [1950] All ER 1064** thus**:**

> **"The rule in Foss-v-Harbottle, as I understand it, comes to no more than this. First, the proper Plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*; or if the simple majority challenges the transaction, there is no valid reason why the company should not sue."**

[7] And in **Amin Akberali Manji & 2 Others vs. Altaf Abdulrasul Dadani [2015] eKLR,** the Court of Appeal affirmed the foregoing holding thus:

> **"It is a cardinal principle in company law that it is for the company and not an individual shareholder to enforce rights of actions vested in the company and to sue for wrongs done to it. It is also cardinal that in absence of illegality a shareholder cannot bring proceedings in respect of irregularities in the conduct of the company's internal affairs in circumstances where the majority are entitled to prevent the bringing of an action in relation to such matters...All this is in deference to the self-regulation the law allows corporations and thus limits the interference by courts in the running of such bodies on their own. However, if due to an illegality a shareholder perceives that the company is put to loss and damage but cannot bring an action for relief in its own name, such shareholder can bring an action by way of a derivative suit."**

[8] Accordingly, it is evident that this is suit that ought to have been filed by the Company itself; and that if anything, the Plaintiff would only be entitled to file a derivative suit, upon complying with the threshold requirements laid down for such purpose. The Court of Appeal further held that:

> **"Leave of court shall be obtained before filing a derivative suit, but may also be obtained to continue with the suit once filed...It is our view that at whatever stageleave is sought, the crucial requirement is for the applicant to establish a prima facie case demonstrating that he has *locus standi* to institute such action, the company is entitled to the intended relief and that the action falls within any of the exceptions to the rule in Foss vs. Harbottle."**

[9] It is therefore a requirement that in such a suit, the plaint plus the application for permission to file a derivative action must be served before the application is heard *inter partes* for the Court's determination to provide the Defendants with an opportunity to present their side of the story. There is no denying that the Plaintiff did not comply with these procedural requirements. In the premises, the instant suit and the ensuing applications are incompetently before the Court.

However, that does not necessarily spell a death knell for the Plaintiff's case for in **Manji vs Dadani** (supra) it was acknowledged that leave can be given for the continuation of an existing suit as a derivative suit.

[10] The foregoing being my view of the matter, I would dismiss the Notice of Motion dated **12 April 2016**, with an order that the costs thereof be in the cause; and direct that these proceedings be stayed pending compliance by the Plaintiff with the procedural requirements for the filing of a derivative suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2017

OLGA SEWE

JUDGE